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May 2, 1997

RECEIVED

MAY 5 1997

Mr. William Caton  
Federal Communications Commission  
1919 M. Street, N.W.  
Room 222  
Washington, D.C. 20554

FCC MAIL ROOM

RE: In the Matter of American Communications Services, Inc.'s  
Petition for Declaratory Ruling Regarding Preemption of the Arkansas  
Telecommunications Regulatory Reform Act of 1997  
CC Docket No. 97-100

Dear Mr. Caton:

Enclosed for filing, please find an original and thirteen (13) copies of the Comments of the Arkansas Telephone Association regarding the above referenced matter.

Kindly file the Comments and return the extra file-marked copy to me in the enclosed self addressed stamped envelope I am providing for your convenience. I am, by Federal Express, mailing a copy of this letter and the Comments to the attorney for the Petitioners, Mr. Brad E. Mutschelknaus, Kelley, Drye & Warren, LLP, 1200 Nineteenth Street, N.W., Suite 500, Washington, D.C., 20036; Mr. Riley M. Murphy, Mr. Charles H. N. Kallenbach, American Communications Services, Inc., 131 National Business Parkway, Suite 100, Annapolis Junction, Maryland, 20701; Ms. Janice Myles, Common Carrier Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C., 20554; and ITS, Inc., 2100 M Street N.W., Suite 140, Washington, D.C., 20037.

With kindest regards.

No. of Copies rec'd  
DATE

0412

Sincerely,

A handwritten signature in black ink, appearing to read "George Hopkins". The signature is fluid and cursive, with a large initial "G" and "H".

**GEORGE HOPKINS**

Attorney at Law

GH/tp

enclosure: Comments of the Arkansas Telephone Association

cc: Mr. Brad E. Mutschelknaus  
Mr. Riley M. Murphy  
Ms. Janice Myles  
ITS, Inc.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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COMMENTS OF THE ARKANSAS TELEPHONE ASSOCIATION

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## SUMMARY

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Federal Act" or "1996 Act" ), provides new directions for the telecommunications industry. The Federal Act provides the mechanism for true competition to occur at each level of the telecommunications industry. Congress did leave barriers to competition in rural areas for the present time. The federal law specifically requires Incumbent Local Exchange Carriers ("ILECs") to negotiate in good faith with other potential providers, to interconnect facilities, and to integrate various network elements with all local providers.

Arkansas had to revise its laws in order to allow the Arkansas Public Service Commission ("Arkansas PSC") to comply with the Federal Act. Arkansas had several laws that were in direct conflict with the federal law and had to be repealed to eliminate conflict. Arkansas, in response to the Federal Act, enacted the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act" or "Act 77"). The Arkansas Act became effective on February 4, 1997. In addition to repealing obsolete laws and laws that were in conflict with the federal law, Arkansas also created the framework for the Arkansas PSC to implement the Federal Act. The Arkansas Act is a conservative approach to the mandated competition in the Federal Act. The approach of Arkansas is demonstrated by the directives within the Arkansas Act for the Arkansas PSC to fulfill the requirements of the Federal Act, to comply with the Federal Act, but to impose no additional state requirements beyond those of the Federal Act.

American Communications Services, Inc. ("ACSF") filed a petition with the Federal Communications Commission ("Commission") seeking a declaratory ruling from the Commission

preempting the Arkansas PSC's authority over interconnection and unbundling network elements. ACSI basically contends the Arkansas PSC has inadequate ability under the Arkansas Act to comply with its obligations under the Federal Act related to these issues. ACSI promotes the position that a conflict between the Arkansas Act and the Federal Act requires federal preemption and Commission control over the interconnection and unbundling process in Arkansas.

A careful review of the Arkansas Act establishes that the Arkansas Act is a carefully worded, conservative statute that allows the Arkansas PSC full authority to do all that is required by the Federal Act, but limits the Arkansas PSC's authority to only that authorized or required by the Federal Act. A review of the specific text of the statute establishes ACSI's position is not supported by the actual language in the Arkansas Act. The Arkansas Act is a fair and legitimate framework for implementation of the Federal Act.

ACSI alleges the Arkansas Act serves as a barrier to competition. However, ACSI has failed to establish the Arkansas Act prohibits the Arkansas PSC from making a decision which would allow ACSI to provide telecommunication services allowed under the Federal Act. ACSI has not established, either directly or indirectly, any telecommunication service it is unable to provide due to the alleged barriers to competition. ACSI argues the Commission should preempt the authority of the Arkansas PSC under the Federal Act due to the inability of the Arkansas PSC to act with the full authority of the Federal Act's provisions. However, in text and action, the Arkansas PSC has authority to do what the Federal Act requires.

ACSI also argues the Arkansas Act provides requirements for the Arkansas Universal Service Fund ("AUSF") inconsistent with Federal Universal Service Fund ("FUSF") requirements. However, the AUSF is a unique and distinct state universal service fund. The FUSF is a creature

of federal law and the AUSF is a creature of state law. The provisions of the AUSF do not have to be similar or equivalent to the FUSF.

The AUSF is a facility-based fund. Any provider may become a recipient of universal service funds, if it meets the specific requirements of the Arkansas Act. In addition, the Arkansas PSC is required to implement rules to establish the exact terms of the AUSF. It is premature to argue that the Arkansas PSC will establish universal service fund rules that are inconsistent with the Federal Act.

The Arkansas Act's universal service provisions do not conflict with the Federal Act. The Arkansas Act allows any provider to become an Eligible Telecommunications Carrier ("ETC"). The Arkansas Act's language tracks the requirements of the Federal Act on universal service requirements. It is appropriate to require an ETC to offer to serve an entire exchange if it offers such service in the media. The Arkansas Act also appropriately allows support for the facilities that the ETC owns and maintains. An ETC may establish a full exchange capability by use of its own facilities or a combination of its facilities and resale. The Arkansas law is flexible and meets the requirements of the Federal Act.

Arkansas has an important interest and right to provide a state regulatory scheme that implements the Federal Act. The Arkansas Act complies with the Federal Act. The Arkansas PSC has the knowledge, ability, and discretion to fairly and fully implement the Federal Act without excess state authority. Arkansas complies with the requirements of the Federal Act and the petition of ACSI should be denied.

Before the  
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CC DOCKET 97-100

**COMMENTS OF THE ARKANSAS TELEPHONE ASSOCIATION**

The Arkansas Telephone Association ("ATA") provides these comments in opposition to American Communications Services, Inc.'s ("ACSI") petition to seek a declaratory ruling regarding preemption of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"). The Arkansas Act and the Arkansas PSC's authority should not be preempted.

ACSI contends that the Arkansas Act should be preempted in two (2) ways. First, ACSI contends the Federal Communications Commission ("Commission") should preempt the Arkansas Act and declare approvals, arbitrations and certifications pertaining to Arkansas interconnections shall be carried out by the Commission. Second, ACSI contends the Arkansas Act's provisions related to universal service funding should be preempted by the Commission.

The Federal Act and the Arkansas Act are consistent. The Arkansas Act provides a state framework for the implementation of the Federal Act. The Commission has also provided guidance and detail beyond the Federal Act to further instruct and assist the state PSCs to implement the Federal Act. Throughout the Arkansas Act, the Arkansas PSC is given specific



and general authority to take action required or authorized under the Federal Act and the Commission's regulations pursuant to the Federal Act.

The Arkansas Act is conservative in approach to competition and interconnection. The Arkansas Act provides the Arkansas PSC with all authority and control required by the Federal Act but does not provide supplemental state authority to authorize action beyond that allowed by the Federal Act. The Arkansas PSC is allowed to take all actions within the Federal Act's "circle of authority" but is not provided excess state authority to take actions beyond such authority.

## **I. BACKGROUND**

### **A. THE FEDERAL ACT ESTABLISHES A FEDERAL POLICY TO ENCOURAGE COMPETITION**

The Federal Act was enacted by Congress in 1996 to provide a national framework to bring new information technologies and services to all Americans by opening all telecommunications markets to competition.<sup>1</sup> The Federal Act sets broad policy guidelines to nurture competition. The Commission has given the Federal Act broad interpretation to allow sufficient authority to both the Commission and the state PSCs to implement the Federal Act's objectives.<sup>2</sup>

The Federal Act anticipates significant interplay and effort by the federal government and state government to implement competition.<sup>3</sup> The Federal Act allows both the state and federal

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<sup>1</sup> Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong. 2d Sess. 113 (1996) (Conference Report).

<sup>2</sup> See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, para. 4 (1996).

<sup>3</sup> See Generally 47 U.S.C. § 252. § 252 allows the state PSCs to arbitrate and approve interconnection agreements. The Federal Act has provisions throughout giving various responsibility to the state PSC.

government significant input on how competition occurs in various states.

**B. THE ARKANSAS ACT ESTABLISHES THE FOUNDATION TO COMPLY WITH THE FEDERAL ACT**

The Arkansas General Assembly passed Act 77 of 1997 ("Arkansas Act") which was signed into law on February 4, 1997.<sup>4</sup> The Arkansas Act repealed numerous state laws that conflicted with the Federal Act.<sup>5</sup> The Arkansas Act provides the Arkansas PSC with specific authority to take all action required or authorized by the Federal Act.<sup>6</sup> The Arkansas Act requires the Arkansas PSC to act consistently with the Federal Act. The Arkansas Act, in essence, drew a large circle into which all authorized actions under the Federal Act was placed. The ATA refers to this theoretical circle as the "circle of authority." The Arkansas Act provides the Arkansas PSC authority to perform any action allowed in that circle but prohibits the exercise of authority outside that broad circle.

ACSI claims the Arkansas Act would prohibit the Arkansas PSC from taking appropriate action concerning interconnections during arbitrations and hearings to appropriately allow competition to occur as contemplated by the Federal Act.<sup>7</sup> Further, ACSI asks for preemption of

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<sup>4</sup> A Copy of the Bill which became the Arkansas Act, is attached to the ACSI Petition. Although the attachment is not a copy of the Act, the language in the attachment is equivalent to the language in the Act. The Act is an enrolled version of the bill and has the Governor's signature thereon reflecting the date the Act was signed into law as February 4, 1997.

<sup>5</sup> See Arkansas Act § 11 (f).

<sup>6</sup> See Id. In relevant sections of the Arkansas Act, the General Assembly, no less than seven (7) times, confirmed the Arkansas Act was not to be read to conflict in any way with the requirements of federal law. Terms, such as "consistent with the Federal Act" § 9 (a); "except to the extent required by the Federal Act" § 9(d); and "in accordance with the Federal Act" Section 10 (a), are used throughout the Arkansas Act.

<sup>7</sup> Petition for Declaratory Ruling, p.3.

the Arkansas Universal Service Fund (“AUSF”) provisions claiming the state universal service fund established by the Arkansas Act is inconsistent with the Federal Act.<sup>8</sup>

The Arkansas Act sets forth in its legislative findings the intent of the General Assembly is to “[p]rovide for a system of regulation of telecommunications services, consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service.”<sup>9</sup>

The Arkansas Act specifically authorizes the Arkansas PSC to do each and every act required by the Federal Act. If the Federal Act is as broadly written as ACSI claims, then the supposed limitation on the Arkansas PSC is only illusory.<sup>10</sup> Apparently, ACSI’s contention is the Federal Act needs state authority in excess of that authorized by the Federal Act in order to implement the Federal Act. Ironically, if the Commission did preempt the Arkansas PSC, the Commission would be left only with the same “circle of authority” that the Arkansas Act prescribes. ACSI’s request, if successful, therefore, would provide it with no greater statutory support than is provided under the Arkansas Act authorizing the Arkansas PSC to carry out the authority of the Federal Act. The ATA has full faith that Congress passed the Federal Act with

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<sup>8</sup> Id. at 6

<sup>9</sup> Arkansas Act § 2.

<sup>10</sup> Petition for Declaratory Ruling, p. iii. In its summary, ACSI claims that the Federal Act “directs the FCC, in conjunction with state regulators, to nurture competition to the *maximum* extent possible”. (emphasis provided in original).

sufficient authority provided to independently implement its terms.<sup>11</sup> A state should be able to properly implement competition without supplemental state authority.

**C. ACSI HAS NOT BEEN INJURED OR HAMPERED BY THE ARKANSAS ACT**

ACSI has not established any injury or harm due to the Arkansas Act. Specifically, ACSI acknowledges it has negotiated and arbitrated an interconnection agreement with Southwestern Bell Telephone Company ("SWBT") in Arkansas.<sup>12</sup> In fact, before the Arkansas PSC had the opportunity to conduct the arbitration, SWBT and ACSI reached an agreement and filed a stipulation amending their negotiated interconnection agreement. The Arkansas PSC approved the amended agreement on December 10, 1996. ACSI further states that the interconnection agreement expires in 1998, at which time it will have to be renegotiated.<sup>13</sup> ACSI alleges it has concerns about its ability to obtain a satisfactory renewal of the interconnection agreement.<sup>14</sup> However, ACSI does not explain what problems it may incur or what additional unbundled network elements that the Arkansas PSC is prohibited from addressing. ACSI does not establish that the Arkansas PSC, due to the passage of the Arkansas Act, cannot provide all relief

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<sup>11</sup> See Generally Federal Act. The ATA assumes that if a state abolished the state PSC and took no action at the state level to implement the Federal Act, then the FCC would be the entity to establish competition for that state. The ATA assumes that the FCC would not need additional state authority from that state to implement the Federal Act. To the extent that the FCC, with a vacuum of state law, could implement competition envisioned by the Federal Act, then the ATA assumes that the state PSC could implement competition with the same amount of authority the FCC would use. This same theoretical basis would also exist if a state passed laws which were preempted pursuant to Section 253 of the Federal Act and the state took no action to remedy the restrictions which created preemption under Section 253.

<sup>12</sup> Petition for Declaratory Ruling, p.3.

<sup>13</sup> Id.

<sup>14</sup> Id.

authorized under the Federal Act.

ACSI further has specified no injury to itself due to the AUSF requirements to qualify as an ("ETC"). If ACSI is willing to meet the requirements of the Arkansas law, it, or any other provider, may receive ETC status.<sup>15</sup> The Arkansas PSC has authority to implement AUSF rules, but has yet established such rules.<sup>16</sup>

## II. ARGUMENT

The Arkansas Act does not prevent the Arkansas PSC from fulfilling its duties under the Federal Act. The ATA agrees the state PSCs have a critical role to play in the evolution of local competition. Both the federal government and state government have an interest in providing telecommunication services to its citizens. However, the ATA disagrees with ACSI's misplaced interpretation of the Arkansas Act. ACSI's apparent position is states must do **more** than what is authorized or required under the Federal Act and Commission regulation to comply with the Federal Act.<sup>17</sup>

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<sup>15</sup> See Arkansas Act § 5 (b)(1).

<sup>16</sup> Id. at § 4 (e).

<sup>17</sup> See Generally Petition for Declaratory Ruling, p. 11. ACSI states that the Arkansas Act deprives the Arkansas PSC of the ability to prescribe any additional interconnection requirements even though such requirements might be appropriate or necessary to the emergence of local competition in Arkansas. Also, on p. 12 of the petition, ACSI discusses the hostility of the Arkansas Act toward the federal policy of competition by the immediate deregulation which it mandates for ILEC. Further, on page 13 of the petition, ACSI states that the Arkansas Act "forbids the Arkansas PSC to regulate dynamically". The ATA reads ACSI petition as an objection to the Arkansas PSC being limited to the confines of the "circle of authority" of the Federal Act in implementing competition. The state has no obligation to do more than what the Federal Act requires. Arkansas is a state with a significant rural population. Even Congress recognized that competition should be treated differently in rural areas in contrast to urban areas. ACSI objects to the deregulation of Arkansas LECs. Deregulation is not prohibited by the 1996 Act. In fact, the conference report on the 1996 Act, referenced on page four (4) of ACSI's petition, has specific language that the law is meant to provide among other things a "de-regulatory national framework". It should be noted that any CLEC would also enjoy the benefits of such deregulation in the Arkansas policy.

The ATA's position is the Arkansas Act provides the Arkansas PSC all the authority established by the Federal Act, including express and implied authority. The authority within the Federal Act is sufficient to enable the Arkansas PSC to comply with the provisions of the Federal Act.

The ATA's argument will focus on four (4) areas. First, whether ACSI has any injury to provide it standing to bring the petition. Second, whether the specific text of the Arkansas Act violates the Federal Act. Third, whether the implementation of the Arkansas Act violates the Federal Act. Fourth, whether the AUSF violates the Federal Act.

#### **A. ACSI HAS NO INJURY TO ESTABLISH STANDING**

ACSI's arguments appear to be more of an attack upon the Arkansas Act on a textual basis rather than upon actual injury to ACSI. ACSI can state no specific action(s) that the Arkansas PSC has refused to take or would refuse to take in a matter involving ACSI on any interconnection matter. Further, ACSI has demonstrated no injury it would suffer under AUSF provisions. ACSI has admitted it is a facility-based competitor of Southwestern Bell Telephone Company (SWBT). ACSI has proven it is capable of purchasing network components from an Arkansas incumbent local exchange carrier ("ILEC") to enable it to compete in Arkansas. A hypothetical series of potential events that might occur does not establish an injury or damage.<sup>18</sup> Mere potential for injury without substantial justification justifies denial of the petition.

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<sup>18</sup> See, Northwest Airlines Inc. vs. F.A.A., 795 F. 2d. 195 (D.C. Cir.1986).

**B. THE SPECIFIC TEXT OF THE ARKANSAS ACT DOES NOT VIOLATE THE FEDERAL ACT**

ATA will focus on the language of the Arkansas Act that ACSI has attacked. ACSI alleges the Arkansas Act “has eliminated the Arkansas PSC’s authority to consider the full range of interconnection options permissible under the 1996 Act[.]”<sup>19</sup> ACSI fails to specify the language of the Arkansas Act that is alleged to limit the authority. The limitation alleged does not exist in the text of the Arkansas Act.

ACSI provides a list of sections of the Arkansas Act that ACSI declares “establishes state goals directly contrary to federal objectives for local interconnection articulated in the 1996 Act.”<sup>20</sup> Prior to looking at the specific list by ACSI, and without conceding the Arkansas Act does not have similar objectives to the Federal Act, it is important to note, states are not required to have the “goals equivalent to federal objectives” as long as the state complies with the Federal Act.

The specific list fails to establish any provision that textually violates the Federal Act. A careful reading of the language establishes the Arkansas Act allows the Arkansas PSC to do all that is required by the Federal Act but does not provide supplemental state authority **beyond** the “circle of authority” of the Federal Act.

A point by point review establishes the ATA’s position. ACSI claims the Arkansas Act:

- states that “in no event” shall the PSC “impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promul-

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<sup>19</sup> Petition for Declaratory Ruling, p. 2

<sup>20</sup> Id. at p. 5.

gated under the Federal Act”;<sup>21</sup>

The language establishes the Arkansas PSC is authorized to impose interconnection requirements “imposed by the Federal Act or any interconnection regulation or standards promulgated under the Federal Act. Through this language, the Arkansas PSC may take any action within the “circle of authority” of the Federal Act. The Arkansas Act does not limit the Arkansas PSC to actual language in the Federal Act but to its “requirements”.<sup>22</sup> The language in the Arkansas Act only prevents the Arkansas PSC from imposing requirements beyond those of the Federal Act.

The next ACSI objection is the Arkansas Act:

- precludes the Arkansas PSC from requiring incumbent LECs to permit resale of local services, to provide interconnection, or to sell unbundled network elements “except to the extent required by the Federal Act”;<sup>23</sup>

Here, the language of the Arkansas Act sets the limits of the Arkansas PSC’s authority precisely to the Federal Act’s limits. Worded a different way, the language requires the Arkansas PSC to provide interconnection and allow the sale of unbundled network elements “to the extent required by the Federal Act.” The limitation only affects action **beyond** the requirements of the

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<sup>21</sup> Id.

<sup>22</sup> See In the Matter of AT&T Communications of the Southwest, Inc.’s Petition for Arbitration of Unresolved issues with Southwestern Bell Telephone Company pursuant to § 252 (b) of the Telecommunications Act of 1996. Docket No. 96-395-U. It appears that ACSI’s fears concerning the Arkansas PSC being unable to understand the extent of the Federal Act in determining what the Federal Act’s “requirements” are unfounded. The Arkansas PSC has shown the ability and foresight to interpret the Federal Act in a broad manner without focusing merely on specific detail.

<sup>23</sup> Petition for Declaratory Ruling, p. 5.



Federal Act.

The next ACSI objection is the Arkansas Act:

- directs that CLECs shall have the ability to obtain from incumbent LECs operator services, directory listings and 911 services “only to the extent required in the Federal Act”,<sup>24</sup>

Again, the language allows a Competitive Local Exchange Carrier (“CLEC”) to obtain operator services, directory listings, and 911 services “to the extent required in the Federal Act”.

The wording provides a limitation only upon such services **beyond** those required by the Federal Act. The language allows all services within the Federal Act’s “circle of authority”.

The next ACSI objection is the Arkansas Act:

- mandates that the PSC “shall approve” incumbent LEC statements of generally available terms and conditions unless shown by “clear and convincing evidence” that the statement fails to meet the minimum requirements of the federal 1996 Act;<sup>25</sup>

Here the language of the Arkansas Act continues to track the “circle of authority” of the Federal Act. If the statement meets the minimum requirements of the Federal Act, then the statement complies with the Federal Act. Here the limitation is upon the Arkansas PSC requiring statements to **exceed** the minimum requirements of the Federal Act.

The next ACSI objection is the Arkansas Act:

- prevents participation by intervenors in arbitration proceedings, severely limiting the PSC’s ability to gauge the potential for discrimination against non-parties.<sup>26</sup>

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<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

The actual language discussed above is as follows:

In the event the Commission is requested to arbitrate any open issue pursuant to Section 252 of the Federal Act (47 USC 252), the parties to the arbitration proceeding shall be limited to the persons or entities negotiating the agreement.<sup>27</sup>

Here the language does not conflict with the Federal Act. ACSI questions the Arkansas PSC's ability to perform its function under the Federal Act. However, nothing in the language violates the Federal Act. The ATA has great respect for the Arkansas PSC's ability to properly perform its function under the Federal Act with or without intervenors in arbitration proceedings. Any violation of the Federal Act would depend upon how well the Arkansas PSC conducts its hearings and makes decisions, not upon the text of the Arkansas Act. The Federal Act requires state PSCs, through appropriate means, to prevent discrimination against non-party carriers. Nothing in the Federal Act requires the Arkansas PSC to allow intervention to provide that protection, and in fact, the Arkansas PSC has requested comments from interested persons regarding the results of arbitration after an agreement is filed reflecting the results of arbitration. Ironically the limitation, of which ACSI complains, is the very procedure ordered by the Arkansas PSC in ACSI's own proceeding concerning its interconnection agreement and ACSI did not complain at that time. The proceeding was commenced and concluded prior to passage of Act 77.

ACSI further contends the Arkansas Act and the Federal Act have another specific conflict.<sup>28</sup> ACSI contends the Commission has found resale restrictions unreasonable under the

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<sup>27</sup> Arkansas Act § 9 (j).

<sup>28</sup> Petition for Declaratory Ruling, p. 6

1996 Act, while the Arkansas Act directs the PSC to approve all resale restrictions permitted by the 1996 Act.<sup>29</sup> If resale restrictions are presumptively unreasonable under the 1996 Act, then the Arkansas PSC must apply a presumptively unreasonable burden on any resale restrictions. However, if, after applying the proper analysis, the Arkansas PSC finds that a resale restriction does not violate the Federal Act, then the resale restriction is allowed by the Arkansas Act. The Arkansas Act requires the Arkansas PSC to approve all resale restrictions **permitted** by the Federal Act. If none are permitted by the Federal Act, then none are permitted under the Arkansas Act.

The ATA reserves discussion of the issues related to AUSF to the AUSF section. However, ACSI makes some additional generic attacks on the Arkansas Act in its discussion of the Arkansas Act which will be addressed in this section.

ACSI seems to object to the deregulation allowed under the Arkansas Act. ACSI has conceded this point in stating that a state could abolish its PSC. In other words, ACSI concedes that a state could totally deregulate telecommunications carriers within a state. While clearly the Commission would then be left to fulfill the requirements of the Federal Act with regard to interconnection, the Commission would have no authority to regulate intrastate rates or services.

Such deregulation is within the authority of the state and does not violate the Federal Act.<sup>30</sup> The ATA is unaware of any limitation in the Federal Act to prevent deregulation of all

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<sup>29</sup> Arkansas Act § 9 (g).

<sup>30</sup> See 47 U.S.C. § 253 (b). Section 253 (b) of the Federal Act allows states to preserve and advance universal services, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. As provided in an early footnote, the conference report on the 1996 Act used the term “de-regulatory” as a policy that is favored in the Federal Act.

providers. Competition, by its nature, is deregulation. The market, not regulators, sets an appropriate price for goods and services. Regulation, typically, is a government imposed substitute for market forces.

ACSI also claims the Arkansas Act “reflects a state policy of passive resistance to the implementation of the 1996 Act.”<sup>31</sup> However, any resistance is only to action **beyond** the requirements of the Federal Act. The Arkansas approach may seem conservative to some. However, states are allowed to be cautious. Congress was cautious when it proposed a more reserved approach to competition in rural areas than in urban areas. Arkansas is a rural state with a lot of rural area for which Congress preferred caution. On the “freeway of competition”, Arkansas is allowed to travel at a slower speed than others so long as it travels at an appropriate speed. The text of the Arkansas Act does not violate the Federal Act. It precisely tracks it.

ACSI states the Arkansas Act “restrains the Arkansas PSC regardless of the views of the Arkansas PSC on the merits of particular interconnection agreements or policies”.<sup>32</sup> The issue is not whether restraint exists, but whether the restraint violates the Federal Act. Textually, the only applicable restraint is that the Arkansas PSC must act within the authority granted by the Federal Act. The Arkansas PSC is not limited from taking any action within the Federal Act’s “circle of authority”

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<sup>31</sup> See Petition for Declaratory Ruling, p.6

<sup>32</sup> Id.

**C. THE IMPLEMENTATION OF THE ARKANSAS ACT DOES NOT VIOLATE THE FEDERAL ACT**

ACSI contends in its petition that the federal law is broadly written to nurture competition to the maximum extent possible. The Arkansas Act allows the Arkansas PSC to take all authorized actions within the Federal Act's broad "circle of authority". In that the text of the Arkansas Act does not violate the Federal Act, the only potential for violation of the Federal Act exists in how the Arkansas PSC will interpret or implement the Federal Act. In other words, if the Arkansas PSC can take any action authorized or required by the Federal Act, then any violation of the Federal Act would only occur if the Arkansas PSC does not fulfill its duties under the Federal Act. It has not, and ACSI has not contended the Arkansas PSC has done anything in conflict with the Federal Act.

ACSI looks beyond the text of the Arkansas Act to contend the Arkansas PSC is limited to specifics of the Federal Act and Commission regulations.<sup>33</sup> The Federal Act and Commission orders implementing the Federal Act cannot specify each detail that the state PSCs must confront. ACSI does not explain how it determined the Arkansas PSC is limited in its authority to apply only the specific rules adopted by the Commission without authority to go beyond the specific rules. The limitation does not exist in theory or practice.<sup>34</sup> The Arkansas Act contains numerous statements that the authority granted the Arkansas PSC authorizes the Arkansas PSC to wield all

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<sup>33</sup> See Petition for Declaratory Ruling, p.10

<sup>34</sup> See Arkansas Act § 9 (d). This provision provides that except to the extent required by the Federal Act and the Arkansas Act, the Commission shall not require certain actions by an ILEC. However, the large qualifier is "except to the extent required by the Federal Act". The Federal Act is a grant of broad authority and not limited to specific language.

power granted by the Federal Act.

ACSI states the Arkansas Act constructively abolishes the Arkansas PSC's role in the implementation of the local interconnection requirements of the 1996 Federal Act.<sup>35</sup> It gives no examples or potential examples of the diminished role of the Arkansas PSC in actions allowed by the Federal Act. The ATA views the Federal Act as a comprehensive framework through which reasonable actions may be taken to promote competition. If the Arkansas PSC must have supplemental state authority to implement the Federal Act, then how can the Commission implement the Federal Act through preemption? If a desired provision is beyond the authorization of the Federal Act, then the Commission, through preemption, could not mandate it either.

ACSI also claims the Arkansas General Assembly has limited the activity of the Arkansas PSC to the extent the Arkansas Act crosses the line that distinguishes permissible from impermissible state infringement on federal policy.<sup>36</sup> ACSI does not explain the specific impermissible infringement. Allowing the Arkansas PSC to take actions authorized by the Federal Act does not infringe on federal policy.

ACSI contends that the Arkansas PSC must be able to arbitrate and approve interconnection agreements. The ATA agrees. ACSI does not establish or explain how the Arkansas Act prevents the Arkansas PSC from implementing appropriate and authorized standards. ACSI is just wrong when it states the Arkansas PSC is denied discretion to consider and act on all issues that could be presented in an interconnection agreement or arbitration due to the Arkansas Act.

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<sup>35</sup> See Petition for Declaratory Ruling, p.10

<sup>36</sup> Id. at p.8.

ACSI seems concerned the Arkansas PSC will limit itself to act only with specific authorization in Commission regulation.<sup>37</sup> ACSI points to the Local Competition Order (“LCO”) as a basis for concern. However, the LCO authorizes state PSCs to prescribe additional elements, and parties may agree on additional network elements in the voluntary negotiation process.<sup>38</sup> The LCO provides the very implied and additional elements the Arkansas PSC has the authority to consider. The broad language of the Federal Act, together with the broad authority of the LCO, allow the Arkansas PSC to take any action authorized under the Federal Act whether specified or implied.

**D. THE ARKANSAS UNIVERSAL SERVICE FUND (“AUSF”) DOES NOT VIOLATE THE FEDERAL ACT.**

The Arkansas Universal Service Fund (“AUSF”) is appropriate and should not be preempted. The Commission has not finalized the rules implementing the Federal Universal Service Fund (“FUSF”). The AUSF is not a part of the FUSF. The FUSF is a creature of federal law and the state universal fund is a creature of state law. The state of Arkansas has a substantial interest in protecting intrastate universal service interests. ACSI has not demonstrated any direct adverse impact to itself or a violation of the Federal Act by the creation of the AUSF.

The Arkansas Act establishes certain conditions for eligibility to receive AUSF as an ETC.<sup>39</sup> To be an ETC, the carrier has the responsibility to provide service to all customers in an

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<sup>37</sup> Id. at p.10.

<sup>38</sup> Local Competition Order at para. 366.

<sup>39</sup> See Arkansas Act § 5.

ILEC's local exchange area using its own facilities at least in part.<sup>40</sup> The AUSF requirements are reasonable. It requires a telecommunications carrier to provide certain facility-based services to the exchange area. Once a facility-based presence exists, then the provider may, by resale or otherwise, obtain necessary network elements to offer service to all customers in the exchange area. ACSI may meet these requirements, if it desires to do so.

The ILECs are still required to be the carrier of last resort and to provide telecommunications services to applicants within its exchange area, even though such applicants are not economically desirable or valuable as customers. As ACSI admits, it may be difficult to service some residential customers economically.<sup>41</sup> The ILEC, initially, has no choice except to serve all customers. Any competing carrier, by providing minimal facilities and through resale, may obtain AUSF support. The distinction is upon the mandated service by the ILEC.

The Arkansas PSC is required to establish rules to implement the AUSF.<sup>42</sup> The rules are not in place at this time. It is premature to assume the Arkansas PSC is incapable of complying with the Federal Act in implementing the AUSF. The FUSF and the AUSF are separate programs funded through separate mechanisms. The AUSF does not have to be a clone of the FUSF program. AUSF serves a distinct and separate state purpose.

The federal law does not specifically prohibit Arkansas from creating a universal service fund that is facility-based. A competing carrier may receive funds from the AUSF. The AUSF encourages LECs to provide services to all potential customers, including economically

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<sup>40</sup> Id.

<sup>41</sup> See Petition for Declaratory Ruling p.17.

<sup>42</sup> See Arkansas Act § 4(e).



unattractive ones, to ensure all areas have access to telecommunications carrier services regardless of the area of the exchange or the economic condition of the community.

The Arkansas Act does not prevent a CLEC from becoming an ETC for universal service support. ACSI argues a CLEC cannot replicate the facilities of an ILEC.<sup>43</sup> ACSI argues the lack of facilities effectively disqualifies a CLECs from being an ETC.<sup>44</sup> However, a CLEC only needs minimal facilities and may obtain the remainder needed through resale to attain ETC status.<sup>45</sup> A CLEC does not have to replicate the local network to attain ETC status, it must have some facility base.

The Arkansas Act is consistent with the Federal Act on the issue of offering services throughout the exchange. The Arkansas Act requires an ETC to offer service to all in an exchange.<sup>46</sup> The Federal Act requires the CLEC/ETC to advertise the availability of such services using media of general distribution.<sup>47</sup> If any applicant in the territory responded to the media information, then the CLEC/ETC should have the duty to offer the advertised service. The Federal Act must require more than to merely place an advertisement. The ability and commitment to honor the public advertisement must be a part of the obligation.

ACSI claims it should be eligible for universal service support for elements of the local

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<sup>43</sup> See Petition for Declaratory Ruling, p.10.

<sup>44</sup> Id.

<sup>45</sup> See Arkansas Act § 5(b)(1).

<sup>46</sup> Id.

<sup>47</sup> See Federal Act § 214(e).